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No. 84-1642

In the Supreme Court of the United States

OCTOBER TERM, 1985

RICHARD KRODEL, PETITIONER

v.

ANDREW J. YOUNG, ETC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether a federal employee's *Bivens* action challenging his failure to receive a promotion is precluded by the comprehensive remedial scheme established by Congress prior to the Civil Service Reform Act of 1978.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-23a) is reported at 748 F.2d 701. The memorandum of the district court (Pet. App. 25a-28a) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 29a-30a) was entered on November 20, 1984. On February 14, 1985, the Chief Justice extended the time within which to file a petition for a writ of certiorari to April 19, 1985, and the petition was filed on April 18, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a management analyst employed by the Social Security Administration. In 1976, petitioner, then 60 years old, applied to the agency's Bureau of Hearings and Appeals (BHA) for a promotion. Petitioner was on the final

list of three persons deemed best qualified for the position, but Mary Pronovost, then 39 years old, was selected from the list for the promotion. Claiming that he had been discriminated against on the basis of his age, petitioner unsuccessfully sought administrative relief. Pet. App. 2a-4a.

2. a. Petitioner then brought this suit in the United States District Court for the District of Columbia, alleging that the BHA's failure to promote him violated the Age Discrimination in Employment Act (ADEA), 29 U.S.C. 633a, and the First and Fifth Amendments. He sought back pay and retroactive promotion under the ADEA and damages against his supervisors in their individual capacities for violation of his constitutional rights under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). In support of his First Amendment claim, petitioner alleged that the BHA refused to promote him in retaliation for his criticisms of agency mismanagement. Pet. App. 5a.

The district court dismissed petitioner's First Amendment claim, reasoning that his criticisms of mismanagement were made within the scope of petitioner's duties as a management analyst (Pet. App. 26a-27a). The district court also concluded that, "to the extent that [petitioner] is claiming that his First Amendment rights were curtailed in retaliation for his filing discrimination claims, these are clearly covered by [the] ADEA," which provided the exclusive remedy for his complaint (*id.* at 27a).[1] Following a bench trial, the district court sustained petitioner's age discrimination claim and awarded him back pay, retroactive promotion, and attorney's fees (*id.* at 2a; see Pet. 12).

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[1]The district court dismissed petitioner's Fifth Amendment claim on the ground that it was "inextricably linked to his age discrimination claims" (Pet. App. 27a). Petitioner did not challenge this dismissal before the court of appeals (see *id.* at 3a) and does not do so before this Court.

b. On cross-appeals, the court of appeals affirmed in all respects (Pet. App. 1a-23a).[2] With respect to the *Bivens* claim, the court of appeals relied chiefly on *Bush* v. *Lucas*, 462 U.S. 367 (1983). In *Bush*, this Court held that a federal employee who, like petitioner, was governed by the remedial scheme in effect prior to enactment of the Civil Service Reform Act of 1978 (CSRA) could not bring an action for damages against his superiors for violation of his First Amendment rights. Petitioner conceded in the court of appeals that "[i]f *Bush* were the principal relevant case [the court of appeals] should be inclined to affirm the District Court * * * on the grounds that there was a 'comprehensive' scheme of civil service remedies both available and used" (Appellee/Cross-Appellant C.A. Br. 25; see Pet. App. 22a).[3] He sought to distinguish *Bush*, however, on the ground that his criticisms of government mismanagement advanced the public interest, while the speech at issue in *Bush* allegedly did not (Appellee/Cross-Appellant C.A. Br. 30; Pet. App. 22a).

The court of appeals did not accept this distinction, observing that the "argument was squarely rejected in *Bush* itself" (Pet. App. 22a; see 462 U.S. at 389-390). Finding *Bush* controlling, the court of appeals concluded that the remedial scheme established by Congress for federal employees in petitioner's position precluded the establishment of an implied cause of action for damages against their superiors under *Bivens* (Pet. App. 21a-23a).[4] The court of

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[2]The government has not sought review by this Court of the court of appeals' affirmance of the award to petitioner under the ADEA.

[3]Petitioner also admitted that, like the plaintiff in *Bush*, he "receive[d] the benefit of civil service remedies" (Appellee/Cross-Appellant C.A. Br. 26) and that "[t]he civil service mechanisms may well be a 'comprehensive' scheme for the protection of the personal interests of the employee wronged" (*id.* at 32).

[4]The court of appeals therefore found it unnecessary to reach the question whether petitioner's speech was constitutionally protected (Pet. App. 6a, 21a).

appeals also noted that petitioner "never raised his first amendment related complaints in any of the five separate grievances he filed at the agency level" and that "[h]is free speech claim is decidedly an afterthought and subsidiary to the age discrimination claim upon which he has prevailed" (*id.* at 22a).

ARGUMENT

Petitioner argues for the first time that he is entitled to pursue his damages action because, unlike the plaintiff in *Bush*, he could not have raised his First Amendment claim through the administrative grievance procedure. He not only failed to raise this argument below, but affirmatively disavowed it (see page 3 & note 3, *supra*). Under these circumstances, petitioner has not preserved his argument for review by this Court. See, *e.g.*, *United States* v. *Mitchell*, 445 U.S. 535, 546 n.7 (1980); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

In any event, the court of appeals' decision is correct and does not conflict with any decision of this Court or any other court of appeals. The Court has recently declined to review claims similar to petitioner's in *Pinar* v. *Dole*, No. 84-1167 (Apr. 15, 1985), and *Cazalas* v. *United States Department of Justice*, No. 84-56 (Feb. 19, 1985), and there is no reason for a different result here. Moreover, because the conduct at issue occurred prior to enactment of the CSRA in 1978, it is governed by provisions no longer in effect, which lack continuing importance. Review by this Court is plainly unwarranted.

In *Bush* v. *Lucas*, *supra*, the Court's refusal to create a *Bivens*-type remedy for federal employees whose First Amendment rights have been violated by their superiors was grounded in the remedial scheme established by statute: "an elaborate remedial system that has been constructed step by step, with careful attention to conflicting policy

considerations, should [not] be augmented by the creation of a new judicial remedy" (462 U.S. at 388). The Court reached this conclusion even though "Congress has provided a less than complete remedy for the wrong" (*id.* at 373). Thus, contrary to petitioner's contention (Pet. 7-13), *Bush* does not rest on the presence of a statutory remedy equivalent to an implied right of action for damages. Rather, the Court left to Congress the difficult balancing required "to evaluate the impact of a new species of litigation between federal employees on the efficiency of the civil service" (462 U.S. at 389), regardless of the precise contours of the remedy actually provided.[5]

Moreover, petitioner was not left without remedies for the agency's failure to promote him. He prevailed in his age discrimination claim and was awarded his promotion retroactively, receiving back pay and attorney's fees. The Constitution hardly requires that his "afterthought" (Pet. App. 22a) of seeking additional damages for "anxiety" and the like (Pet. 13 n.6) be successful.[6] In addition, the comprehensive remedial scheme protecting federal civil servants from arbitrary action by their superiors provided petitioner with an informal mechanism for pursuing any complaints, including those regarding First Amendment rights, that he

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[5]The court of appeals' decision is not contrary to *Davis* v. *Passman*, 442 U.S. 228 (1979). The Court concluded there that Title VII of the Civil Rights Act of 1964 did not evince a congressional intent "to foreclose alternative remedies" such as an implied action for damages under the Fifth Amendment (442 U.S. at 247). *Davis*, which the Court distinguished in *Bush* (462 U.S. at 376-377), did not address the preclusive effect of the pre-CSRA remedial scheme applicable to civil servants such as petitioner; *Bush* did.

[6]Petitioner's position is similar to that of the employee in *Bush*, who had already obtained retroactive reinstatement and back pay (462 U.S. at 386 n.29) and sought to recover under the First Amendment for "emotional and dignitary harms" (*id.* at 372 n.9).

had concerning his failure to obtain a promotion. See U.S. Civil Service Commission, *Federal Personnel Manual,* ch. 335, §§ 5-2(g) and (h), 5-3 (1975).[7]

Several courts of appeals, consistently with the decision below, have refused to recognize implied rights of action by federal employees to recover damages for alleged wrongs in connection with their employment. See *Weatherford* v. *Dole*, No. 84-1252 (10th Cir. June 6, 1985); *Pinar* v. *Dole*, 747 F.2d 899 (4th Cir. 1984), cert. denied, No. 84-1167 (Apr. 15, 1985); *Hallock* v. *Moses*, 731 F.2d 754 (11th Cir. 1984); *Braun* v. *United States*, 707 F.2d 922 (6th Cir. 1983); *Broadway* v. *Block*, 694 F.2d 979 (5th Cir. 1982). Contrary to petitioner's contention (Pet. 13-17), there is no conflict requiring resolution by this Court. In *Bartel* v. *FAA*, 725 F.2d 1403 (D.C. Cir. 1984), the court of appeals did not decide "which, if any," of the plaintiff's allegations "survive the holding in *Bush*" (*id.* at 1415 n.21); in any event, the case presents at most an intra-circuit disagreement that should be resolved by the court of appeals, not by this Court.[8] See *Wisniewski* v. *United States*, 353 U.S. 901 (1957). *Egger* v. *Phillips*, 710 F.2d 292 (7th Cir. 1983) (en banc), cert. denied,

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[7]Even if petitioner could pursue an implied damages remedy, the district court correctly concluded that petitioner's comments on the functioning of his employing agency—made in the course of his employment as a management analyst—did not constitutionalize the agency's failure to grant him a promotion. See *Connick* v. *Myers*, 461 U.S. 138 (1983); *Pickering* v. *Board of Education*, 391 U.S. 563 (1968). At bottom, petitioner's complaint is that his work product was not being evaluated properly, not that his freedom of speech was impaired. He has failed to carry his burden of demonstrating that his First Amendment rights were implicated by the agency's personnel decisions. See generally *Mt. Healthy City School District Board of Education* v. *Doyle*, 429 U.S. 274, 287 (1977).

[8]Had petitioner presented the theory on which he now relies to the court of appeals, that court would have had the opportunity to assess the relevance of its holding in *Bartel* to this case.

No. 83-5319 (Oct. 17, 1983), and *Sonntag* v. *Dooley*, 650 F.2d 904 (7th Cir. 1981), were decided prior to this Court's decision in *Bush* v. *Lucas*, and, insofar as they held that *Bivens* actions by federal employees were not precluded, they can no longer be regarded as authoritative.[9] Finally, because new protections for "whistleblowers" have been provided by Congress in the CSRA (see 5 U.S.C. 1206(a)-(c)), petitioner's claims, which arose prior to enactment of the CSRA, do not provide a suitable vehicle for determining the preclusive effect of the provisions now in force.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[9]See *Francisco* v. *Schmidt*, 575 F. Supp. 1200, 1203 (D. Wis. 1983). The court of appeals in *Egger* "reject[ed]" (710 F.2d at 298) the Fifth Circuit's decision in *Bush*, finding it "of questionable viability" (*id.* at 298 n.5). This Court later affirmed in *Bush*. More recently, the Seventh Circuit has refused to find an implied cause of action under the CSRA for a federal employee seeking to challenge the denial of a promotion. *Schrachta* v. *Curtis*, 752 F.2d 1257 (1985).